

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF ADOPTION,
Rules I through IX, the amendment of)	AMENDMENT, AND REPEAL
ARM 2.21.4001, 2.21.4002, 2.21.4005,)	
2.21.4013, 2.21.4014, and the repeal of)	
ARM 2.21.4003, 2.21.4004, 2.21.4006,)	
2.21.4007, and 2.21.4012 pertaining to)	
equal employment opportunity,)	
nondiscrimination, and harassment)	
prevention)	

TO: All Concerned Persons

1. On June 9, 2011, the Department of Administration published MAR Notice No. 2-21-448 regarding a public hearing to consider the proposed adoption, amendment, and repeal of the above-stated rules at page 982 of the 2011 Montana Administrative Register, Issue Number 11.

2. On July 8, 2011, the department held a public hearing on the proposed adoption, amendment, and repeal.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: The department received a request for clarification on the use of "agency managers" throughout the policy.

RESPONSE #1: The department will not define "agency managers," since organizational structures vary within state government. The department will include language in ARM 2.21.4005 allowing agencies to define "agency managers" consistent with their internal policies and procedures.

COMMENT #2: The department received a request for an online reporting tool, in lieu of the proposed Word document, referred to in New Rule VII (2.21.4027) to lessen the potential burden on an already busy staff.

RESPONSE #2: The department will not provide an online reporting tool. It has created an Excel spreadsheet in lieu of a Word document. The spreadsheet is available at <http://hr.mt.gov/hrpp/policies.mcp>. The department does not believe tracking and reporting of internal complaints will require a significant amount of time or effort regardless of the tool used.

COMMENT #3: The department received a recommendation to use "will" or "shall" in lieu of "may" under ARM 2.21.4005(2).

RESPONSE #3: The department will not make this change, as rule and statute use "may not" as a strict prohibition. In writing rules, the department follows, as appropriate, the Legislative Services Division's Bill Drafting Manual. The manual requires that the phrase "may not" be used when qualifying a verb in the active voice that prohibits some act.

COMMENT #4: The department received comments concerning terminology, formatting, and sentence clarity under New Rules I(2), III(5), IV(1)(2), V(2), and VII(2) and (3). The department received similar comments for ARM 2.21.4005(5), 2.21.4013(1), (3), and (4), and 2.21.4014(2).

RESPONSE #4: The department will make the proposed changes to promote consistency and clarity of the rules.

4. The department has adopted New Rules II (2.21.4029), VI (2.21.4022), VIII (2.21.4028), and IX (2.21.4008) as proposed.

5. The department amended ARM 2.21.4001 and 2.21.4002 as proposed.

6. The department has adopted New Rules I (2.21.4009), III (2.21.4019), IV (2.21.4020), V (2.21.4021), and VII (2.21.4027), but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (2.21.4009) COMPLIANCE WITH THE FEDERAL GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA) (1) through (2)(b) remain as proposed.

(c) ~~making requests for~~ requesting information about an individual's current health status in a way that is likely to result in obtaining genetic information.

(3) through (5) remain as proposed.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

NEW RULE III (2.21.4019) INITIATING AN INTERNAL COMPLAINT

(1) through (4) remain as proposed.

(5) The human resource manager, EEO officer or ADA coordinator, legal counsel, and appropriate manager shall meet to discuss the appropriate course of action. If the complaint is against any of these individuals, ~~they are~~ that individual is excluded from the meeting. The discussion must focus on measures to stop the alleged behavior, a review of the investigative process, and management's role in the process.

(6) and (7) remain as proposed.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

NEW RULE IV (2.21.4020) INVESTIGATING A COMPLAINT (1) The EEO officer, ADA coordinator, or another representative chosen by management shall promptly begin an investigation upon receiving a complaint.

(2) and (2)(a) remain as proposed.

(b) what retaliation is and that it ~~will not be tolerated~~ is unacceptable behavior; and

(c) through (4)(c) remain as proposed.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

NEW RULE V (2.21.4021) POST-INVESTIGATION ACTIONS (1) through (2)(b) remain as proposed.

(c) reemphasize that retaliation ~~will not be tolerated~~ is unacceptable behavior; and

(d) contact the complainant within 30 days to ensure the behavior has stopped and ~~there was~~ no retaliation has occurred.

(3) remains as proposed.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

NEW RULE VII (2.21.4027) TRACKING AND REPORTING INTERNAL COMPLAINTS (1) through (2)(b) remain as proposed.

(c) the protected class or basis of the complaint (~~protected class~~);

(d) the reason for complaint (~~e.g., for example~~, employment-related, denied access to a program or service, or inappropriate comment); and

(e) the outcome of the complaint.

(3) The report is for tracking purposes only and ~~must~~ may not include confidential information such as names of individuals involved.

(4) remains as proposed.

7. The department has amended ARM 2.21.4005, 2.21.4013, and 2.21.4014 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

2.21.4005 EQUAL EMPLOYMENT OPPORTUNITY (EEO) AND NONDISCRIMINATION (1) remains as proposed.

(2) Agency managers, as defined by the agency in policy or rule to promote consistency with internal policies and procedures, may not tolerate discrimination or

harassment based on an individual's race, color, national origin, age, physical or mental disability, marital status, religion, creed, sex, sexual orientation, political beliefs, genetic information, veteran's status, culture, social origin or condition, or ancestry. Likewise, agency management may not tolerate discrimination or harassment because of a person's marriage to or association with individuals in one of the previously mentioned protected classes.

(3) through (4)(e) remain as proposed.

(5) Agency managers who observe behaviors that may be viewed as discriminatory shall ~~immediately~~ stop the behavior and ~~promptly~~ notify their agency's EEO officer, Americans with Disabilities Act (ADA) coordinator, or human resources manager.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

2.21.4013 HARASSMENT (1) Harassment, including sexual harassment, ~~may~~ consists of, but is not limited to, oral, written, or electronic communications (~~e.g., for example,~~ voice mails, e-mails, text messages, or other social networking tools) in the form of repeated and unwelcomed jokes, slurs, comments, visual images, or innuendos based on a protected class. Even mutually agreeable behavior, or behavior accepted between two or more people, can be offensive to others; for this reason it is prohibited in the workplace.

(2) remains as proposed.

(3) Agency managers may not tolerate any behavior that negatively focuses on a protected class. Although a behavior or pattern of behavior ~~may~~ might not constitute illegal discrimination, it ~~may~~ might still violate this rule.

(4) Agency managers who observe behaviors that ~~may~~ could be viewed as discrimination or harassment shall ~~immediately~~ stop the behavior and ~~promptly~~ notify their agency's EEO officer, ADA coordinator, or human resources manager.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

2.21.4014 RETALIATION (1) remains as proposed.

(2) Agency managers who become aware of retaliation shall ~~immediately~~ inform the agency's human resource manager, human resource staff, EEO officer, or ADA coordinator, ~~who can~~ The human resource manager, human resource staff, EEO officer, or ADA coordinator shall advise management on the appropriate course of action.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

8. The department repealed ARM 2.21.4003, 2.21.4004, 2.21.4006, 2.21.4007, and 2.21.4012 as proposed.

By: /s/ Sheryl Olson
Sheryl Olson, Deputy Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State August 15, 2011.